

1
2
3
4
5
6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT TACOMA

9 Kristopher B.,

10 Plaintiff,

11 v.

12 Nancy A. Berryhill, Deputy
13 Commissioner of Social Security for
14 Operations,

15 Defendant.

CASE NO. 3:18-cv-05485-DWC

ORDER REVERSING AND
REMANDING DEFENDANT'S
DECISION TO DENY BENEFITS

16 Plaintiff Kristopher B. filed this action, pursuant to 42 U.S.C. § 405(g), for judicial
17 review of Defendant's denial of Plaintiff's application for supplemental security income ("SSI").
18 Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73 and Local Rule MJR 13,
19 the parties have consented to have this matter heard by the undersigned Magistrate Judge. *See*
20 Dkt. 5.

21 After considering the record, the Court concludes the Administrative Law Judge ("ALJ")
22 erred in failing to properly consider the medical opinions of Kimberly Wheeler, Ph.D. Had the
23 ALJ properly considered the medical opinion evidence, the ALJ may have determined Plaintiff is
24 disabled or included additional limitations in the residual functional capacity ("RFC")
assessment. Therefore, the ALJ's error is harmful and this matter should be reversed and

1 remanded pursuant to sentence four of 42 U.S.C. § 405(g) to the Deputy Commissioner of the
2 Social Security Administration for Operations (“Commissioner”) for further proceedings
3 consistent with this Order.

4 FACTUAL AND PROCEDURAL HISTORY

5 On April 7, 2016, Plaintiff protectively filed an application for SSI with a stipulated onset
6 date of January 16, 2015 (partial reopening of a prior claim). *See* Dkt. 12, Administrative Record
7 (“AR”) 124-25, 340-45, 347. The application was denied upon initial administrative review and
8 on reconsideration. *See* AR 254-62, 266-72. A hearing was held before ALJ Allen G. Erickson
9 (“the ALJ”) on June 13, 2017. *See* AR 110-96. In a decision dated December 26, 2017, the ALJ
10 determined Plaintiff to be not disabled. *See* AR 20-42. Plaintiff’s request for review of the ALJ’s
11 decision was denied by the Appeals Council, making the ALJ’s decision the final decision of the
12 Commissioner. *See* AR 7-13; 20 C.F.R. § 404.981, § 416.1481.

13 In Plaintiff’s Opening Brief, Plaintiff maintains the ALJ erred by failing to properly
14 consider: (1) the medical opinion evidence; (2) Plaintiff’s subjective symptom testimony; (3) the
15 lay witness testimony; and (4) the RFC and step five findings including Plaintiff’s need for a
16 cane and ability to frequently handle. Dkt. 14 at 1.

17 STANDARD OF REVIEW

18 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner’s denial of
19 social security benefits if the ALJ’s findings are based on legal error or not supported by
20 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th
21 Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).

DISCUSSION

I. Whether the ALJ erred in assessing the medical opinion evidence.

Plaintiff alleges the ALJ failed to properly consider the medical opinion evidence of Kimberly Wheeler, Ph.D., an examining psychologist. Dkt. 14 at 4-8.

The ALJ must provide “clear and convincing” reasons for rejecting the uncontradicted opinion of either a treating or examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996) (citing *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988); *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9th Cir. 1990)). When a treating or examining physician’s opinion is contradicted, the opinion can be rejected “for specific and legitimate reasons that are supported by substantial evidence in the record.” *Lester*, 81 F.3d at 830-31 (citing *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995); *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)). The ALJ can accomplish this by “setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings.” *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (citing *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989)).

Dr. Wheeler examined Plaintiff on two occasions, once on February 22, 2016, and the second time on May 12, 2017. AR 501-05 (first examination), 830-34 (second examination).

In the first examination, Dr. Wheeler diagnosed Plaintiff with anxiety disorder, NOS; unspecified psychotic disorder; polysubstance chemical dependence in remission and cannabis ongoing; and rule out cognitive disorder, comprehension issue. AR 502-503. Dr. Wheeler noted Plaintiff’s mood was dysphoric and anxious and affect was blunted and nearly flat, and Plaintiff had diminished comprehension, audio hallucinations, and impaired memory and concentration. AR. 504-05.

1 Dr. Wheeler opined Plaintiff had marked limitations¹ in his ability to adapt to changes in
2 a routine work setting; perform effectively in a work setting; and complete a normal work day
3 and work week without interruptions from psychologically based symptoms. AR 503. Dr.
4 Wheeler opined Plaintiff had moderate limitations² in his ability to perform activities within a
5 schedule, maintain regular attendance, and be punctual within customary allowances without
6 special supervision. AR 503. Dr. Wheeler opined Plaintiff had an overall severity rating of
7 “marked” based on the combined impact of his diagnosed mental impairments. AR 503. Dr.
8 Wheeler determined these limitations and impairments would persist for more than 12 months
9 and were not the result of drug addiction and alcoholism and would persist 60 days after
10 sobriety, with the need for treatment of chemical dependency. AR 504.

11 On May 12, 2017, Dr. Wheeler conducted her second examination. AR 830-34. Dr.
12 Wheeler diagnosed Plaintiff with major depressive disorder, recurrent, severe, with psychotic
13 features. AR 831. Dr. Wheeler observed Plaintiff’s mood was profoundly dysphoric, affect was
14 flat, thought content was reflected despondency, insight was impaired by depression, and
15 attention was abraded. AR 834. Dr. Wheeler observed Plaintiff was preoccupied during
16 concentration tasks and Plaintiff reported audio hallucinations and he was giving up in life. AR
17 834. In her clinical findings, Dr. Wheeler noted Plaintiff suffered from depression, low energy,
18 suicidal thoughts, history of anger, impaired reading, and hearing voices. AR 831.

19 Dr. Wheeler opined Plaintiff had severe limitations³ in his ability to communicate and
20 perform effectively in a work setting. AR 831. Dr. Wheeler opined Plaintiff had marked

22 ¹ Defined as “a very significant limitation on the ability to perform one or more basic work activity.” AR
23 503, 832.

² Defined as “significant limits on the ability to perform one or more basic work activity.” AR 503, 832.

24 ³ Defined as “inability to perform the particular activity in [a] regular competitive employment or outside of
a sheltered workshop.” AR 832.

1 limitations in his ability to perform activities within a schedule, maintain regular attendance, and
2 be punctual within customary tolerances without special supervision; the ability to adapt to
3 changes in a routine work setting; and the ability to complete a normal work day and work week
4 without interruptions from psychologically based symptoms. AR 831-32. Dr. Wheeler found
5 Plaintiff had moderate limitations in his ability to understand, remember, and persist in tasks by
6 following very short and simple and detailed instructions; learn new tasks; make simple work-
7 related decisions; ask simple questions or request assistance; set realistic goals and plan
8 independently; and maintain appropriate behavior in a work setting. AR 832. Dr. Wheeler opined
9 Plaintiff's overall severity rating was "severe" based on the combined impact of his diagnosed
10 mental impairments. AR 832. Dr. Wheeler determined these limitations and impairments would
11 persist 18 months or more and they were not the result of drug addiction and alcoholism, would
12 persist after 60 days of sobriety, and vocational rehabilitation would not help. AR 831.

13 Dr. Wheeler found Plaintiff's mental health had substantially declined since the first
14 examination in February 2016, noting:

15 Substantial decline in functioning from last year -- level of despondency is
16 alarming. Deeply depressed, increasing suicidal thoughts, though intent is
17 somewhat curbed by knowing his dog needs him. Frankly, he's becoming at risk for
18 hospitalization, given his acute lack of social support and increasing
19 stressors....The bigger challenge for him right now is despondency - doesn't believe
20 that actions he takes will make a difference. Has become deeply jaded, no longer
21 trusting enough to make effective use of resources, so the likelihood of him staying
22 mired in severe depression is high unless someone intervenes on his behalf. He's in
23 no way capable of sustained employment, and likelihood of restoration within the
24 year is virtually nil.

AR 833.

21 The ALJ assigned little weight to both of Dr. Wheeler's opinions, finding the opinions
22 were inconsistent with the opinions of treating neurologist, Zhongzeng Li, M.D. and treating
23 psychiatrist, Matthew E. Gomez, D.O. AR. 33-34. The ALJ reasoned Dr. Li found Plaintiff had a
24

1 normal mental status, AR 33 (citing AR 496, 499), and Dr. Gomez found Plaintiff was friendly
2 and cooperative, had linear and logical thought process, no cognitive defects, and good insight
3 and judgment, AR 33 (citing AR 882).

4 First, the ALJ cites to Dr. Li's treatment notes in which Plaintiff had normal memory,
5 attention, language, and knowledge. AR 33 (citing AR 496, 499). However, the significance of
6 these treatment notes is unclear. Plaintiff sought treatment from Dr. Li for his myotonic
7 dystrophy and seizure disorder. AR 495. Dr. Li conducted a neurologic examination, but did not
8 conduct a psychological evaluation or any psychological tests. *See* AR 495-99. Therefore, this
9 evidence shows nothing more than Dr. Li was consulted for Plaintiff's myotonic dystrophy and
10 seizures, and not for his mental impairments. *See Sousa v. Callahan*, 143 F.3d 1240, 1244 (9th
11 Cir. 1998) (lack of references to mental impairments in reports prepared by doctors who were
12 consulted for other reasons "is not probative of anything except the fact that these physicians
13 were consulted for other matters."); *Diedrich v. Berryhill*, 874 F.3d 634, 641 (9th Cir. 2017
14 (holding it was not proper to reject the plaintiff's testimony because her orthopedist did not note
15 her mental health symptoms in an orthopedic evaluation).

16 Second, the ALJ cites to Dr. Gomez's treatment notes wherein he observed Plaintiff had
17 linear and logical thought content and process, good judgment and insight, and no cognitive
18 defects.⁴ AR. 881-82.

21 ⁴ Defendant argues numerous other treatment notes show Plaintiff had a normal mood and affect, exhibited
22 sound judgment, and acted cooperatively. Dkt. 18 at 7 (citing AR 485, 487, 518, 523, 529, 534, 541, 671, 674, 705,
23 716, 811, 816, 823, 828). However, the ALJ did not reference these treatment notes in his decision, and the Court
24 will not consider Defendant's post-hoc rationalization. *Bray v. Comm'r of SSA*, 554 F.3d 1219, 1225-26 (9th Cir.
2009) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (other citation omitted) (According to the Ninth
Circuit, "[l]ong-standing principles of administrative law require us to review the ALJ's decision based on the
reasoning and actual findings offered by the ALJ—not *post hoc* rationalizations that attempt to intuit what the
adjudicator may have been thinking.")).

1 An ALJ is tasked with resolving conflicts and ambiguities in the medical record. *Andrews*
2 *v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). They are often confronted with contradictory
3 medical opinions from different doctors and must determine which to accept and which to reject.
4 In order to reject an examining doctor's opinion which, as here, is contradicted by another
5 doctor's opinion, an ALJ must provide specific and legitimate reasons for doing so. *Lester*, 81
6 F.3d at 830-31; *Andrews*, 53 F.3d at 1041-42.

7 However, "[t]o say that medical opinions are not supported by sufficient objective
8 findings or are contrary to the preponderant conclusions mandated by the objective findings does
9 not achieve the level of specificity our prior cases have required, even when the objective factors
10 are listed seriatim." *Embrey*, 849 F.2d at 421. To reject an examining physician's opinion, an
11 ALJ "can satisfy the substantial evidence requirement by setting out a detailed and thorough
12 summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and
13 making findings. The ALJ must do more than state conclusions. He must set forth his own
14 interpretations and explain why they, rather than the doctors', are correct." *Garrison v. Colvin*,
15 759 F.3d 995, 1012 (9th Cir. 2014) (internal quotation marks and citation omitted).

16 Here, "[the ALJ] merely states that the objective factors point toward an adverse
17 conclusion and makes no effort to relate any of these objective factors to any specific medical
18 opinions and findings he rejects. This approach is inadequate." *Embrey*, 849 F.2d at 422. The
19 ALJ identified a contradiction between Dr. Wheeler's opinions and Dr. Gomez's opinion, but
20 failed to provide his interpretation of the evidence and did not provide a detailed explanation as
21 to why Dr. Wheeler's opinions should be discounted.

22 Moreover, the ALJ's decision to reject the opinions of examining psychiatrist Dr.
23 Wheeler in favor of treating psychiatrist Dr. Gomez's opinion is not supported by the record. Dr.
24

1 Gomez treated Plaintiff once on August 17, 2016. AR 880-882. However, beyond an observation
2 Plaintiff had no cognitive defects and was not psychotic or delusional, Dr. Gomez offered very
3 little explanation for his findings. AR 882. Dr. Gomez recommended Plaintiff continue with
4 individual therapy and his Gabapentin and Amitriptyline medications, but concluded Plaintiff
5 was not a candidate for additional medication at this time.⁵ AR 882. Dr. Gomez's opinion was
6 not based on any psychological testing aside from what appears to be a brief mental status
7 examination, nor did he offer any opinion as to the impact of Plaintiff's ability to obtain or
8 maintain full-time employment. AR 880-82.

9 On the other hand, Dr. Wheeler examined Plaintiff on two occasions. AR 501-05, 830-34.
10 Dr. Wheeler performed clinical interviews which documented Plaintiff's psychosocial,
11 medical/mental health, educational/work, and substance abuse history. AR 501, 830-31. Dr.
12 Wheeler outlined her clinical findings, listing the mental health symptoms which affected
13 Plaintiff's ability to work. AR 502, 830-32. Dr. Wheeler conducted mental status examinations
14 of Plaintiff which included a numerous psychological tests. *See* AR 504-05, 833-34. Based on
15 these examinations, test results, and a review of Plaintiff's medical record, she found Plaintiff's
16 mental impairments caused particular difficulty in his ability to sustain various work activities
17 over a normal work day and work week in an ongoing, appropriate, and independent basis. AR
18 503, 831-33. Although she offered no specific opinion on Plaintiff's ability to obtain or maintain
19 full-time employment in her first evaluation, Dr. Wheeler opined Plaintiff would likely make
20 mistakes in a work setting, could not fully grasp instructions, was reluctant to ask questions and
21 recommended a protective payee if awarded funds. AR 504. In a hypothetical posed to the
22

23
24 ⁵ Dr. Gomez indicated it was unsafe for Plaintiff to take additional medications based on his drug use. AR 882.

1 vocational expert (“VE”) containing restrictions on an individual’s ability to understand,
2 remember and persist in tasks, the VE opined such a person could not perform any full-time
3 work. AR at 194. In her second opinion, Dr. Wheeler opined Plaintiff is “in no way capable of
4 sustained employment, and the likelihood of restoration within the year is virtually nil.” AR 833

5 Plaintiff also contends the ALJ erred by finding the opinions of two non-examining
6 psychologists, Carla van Dam, Ph.D. and Bruce Eather, Ph.D., were inconsistent with Dr.
7 Wheeler’s opinions. Dkt. 14 at 6-8. Defendant asserts the opinions of Drs. Eather and van Dam
8 support the decision to discount the opinions of Dr. Wheeler. Dkt. 18 at 6-8. Although the ALJ
9 cited the opinions of these non-examining consultants to support his decision to deny benefits,
10 *see* AR 33-34, he did not cite these opinions as a basis for discounting the opinions of Dr.
11 Wheeler. Even still, the opinion of a non-treating, non-examining consultant, without other
12 substantial evidence, is an insufficient basis for discounting the opinions examining experts. *See*
13 *Lester*, 81 F.3d at 831 (A non-examining physician’s opinion may constitute substantial evidence
14 only if “it is consistent with other independent evidence in the record.”); *see also Ryan v.*
15 *Commissioner*, 528 F.3d 1194, 1202 (9th Cir. 2008).

16 Thus, the ALJ’s conclusory statement Dr. Wheeler’s opinions are contradicted by the
17 opinions of Drs. Li and Gomez is not supported by the record or any explanatory analysis and is
18 not a legitimate basis for rejecting Dr. Wheeler’s opinions.

19 “[H]armless error principles apply in the Social Security context.” *Molina v. Astrue*, 674
20 F.3d 1104, 1115 (9th Cir. 2012). An error is harmless, however, only if it is not prejudicial to the
21 claimant or “inconsequential” to the ALJ’s “ultimate nondisability determination.” *Stout v.*
22 *Commissioner, Social Security Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006); *see Molina*, 674
23 F.3d at 1115. The determination as to whether an error is harmless requires a “case-specific
24

1 application of judgment” by the reviewing court, based on an examination of the record made
2 “‘without regard to errors’ that do not affect the parties’ ‘substantial rights.’” *Molina*, 674 F.3d at
3 1118-1119 (*quoting Shinseki v. Sanders*, 556 U.S. 396, 407 (2009)). Furthermore, “the fact that
4 the administrative law judge, had [he] considered the entire record, might have reached the same
5 result does not prove that [his] failure to consider the evidence was harmless. Had [he]
6 considered it carefully, [he] might well have reached a different conclusion.” *Hollingsworth v.*
7 *Colvin*, 2013 WL 3328609, *4 (W.D. Wash. July 1, 2013) (*quoting Spiva v. Astrue*, 628 F.3d
8 346, 353 (7th Cir. 2010)).

9 Had the ALJ properly considered all of Dr. Wheeler’s opined limitations, the ALJ may
10 have found Plaintiff disabled or included additional limitations in the RFC. For example, Dr.
11 Wheeler found Plaintiff has moderate to severe limitations in his ability to understand,
12 remember, and persist in tasks by following short and detailed instructions; adapt to changes in a
13 routine work setting; perform activities within a schedule, maintain regular attendance, and be
14 punctual within customary tolerances without special supervision; communicate and perform
15 effectively in a work setting; and complete a normal work day and work week without
16 interruptions from psychologically based symptoms. AR 503, 832. These limitations were not
17 accounted for in the RFC. *See* AR 27-28 (RFC limited Plaintiff to light work with occasional
18 interaction with the general public and he can understand, remember and apply short, simple
19 instructions, perform routine tasks, and make simple decisions, but cannot work in a fast-paced
20 production environment.). If Dr. Wheeler’s opinions as to Plaintiff’s limitations were included in
21 the RFC and in the hypothetical questions posed to the vocational expert, the ultimate disability
22 determination may have changed. Therefore, the ALJ’s error is not harmless. *See Molina*, 674
23 F.3d at 1115.

1
2 **II. Whether the ALJ provided proper reasons for discounting Plaintiff's**
3 **subjective symptom testimony and the lay witness testimony.**

4 Plaintiff contends the ALJ erred in evaluating Plaintiff's subjective symptom testimony
5 and the lay witness testimony from Tasha Lux. Dkt. 14 at 12-16. As previously stated, the Court
6 concludes the ALJ committed harmful error in assessing the medical evidence. *See* Section I,
7 *supra*. Because Plaintiff will be able to present new evidence and testimony on remand, and
8 because proper consideration of the medical opinion evidence may impact the ALJ's assessment
9 of Plaintiff's subjective symptom testimony and the lay witness testimony, the Court declines to
10 consider whether the ALJ erred with respect to Plaintiff's testimony and the lay witness
11 testimony. Instead, the ALJ shall reassess Plaintiff's subjective symptom testimony and the lay
12 witness testimony as necessary on remand.

13 **III. Whether the RFC and Step Five findings are supported by substantial**
14 **evidence.**

15 Plaintiff maintains the RFC and Step Five findings are not supported by substantial
16 evidence. Dkt. 14 at 16-18. Specifically, Plaintiff argues the ALJ did not provide sufficient
17 reasons for not finding Plaintiff needs a cane to ambulate and the finding Plaintiff can sustain
18 frequent handling. Dkt. 14 at 8-12. The Court has found the ALJ committed harmful error and
19 has directed the ALJ to reassess medical opinion evidence, Plaintiff's subjective symptom
20 testimony, and the lay witness testimony on remand. *See* Sections I.-II., *supra*. Hence, the ALJ
21 shall reassess the RFC on remand. *See* Social Security Ruling 96-8p, 1996 WL 374184 (1996)
22 (an RFC "must always consider and address medical source opinions"); *Valentine v. Comm'r of*
23 *Soc. Sec. Admin.*, 574 F.3d 685, 690 (9th Cir. 2009) ("an RFC that fails to take into account a
24 claimant's limitations is defective"). As the ALJ must reassess Plaintiff's RFC on remand, the
ALJ is directed to re-evaluate Step Five to determine whether there are jobs existing in

1 significant numbers in the national economy Plaintiff can perform given the RFC. *See Watson v.*
2 *Astrue*, 2010 WL 4269545, at *5 (C.D. Cal. Oct. 22, 2010) (finding the RFC and hypothetical
3 questions posed to the VE defective when the ALJ did not properly consider two physicians’
4 findings).

5 **IV. Whether an award of benefits is warranted.**

6 Lastly, Plaintiff requests the Court remand this case for an award of benefits. Dkt. 14 at 2.

7 The Court may remand a case “either for additional evidence and findings or to award
8 benefits.” *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1992). Generally, when the Court
9 reverses an ALJ’s decision, “the proper course, except in rare circumstances, is to remand to the
10 agency for additional investigation or explanation.” *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th
11 Cir. 2004) (citations omitted). However, the Ninth Circuit created a “test for determining when
12 evidence should be credited and an immediate award of benefits directed.” *Harman v. Apfel*, 211
13 F.3d 1172, 1178 (9th Cir. 2000). Specifically, benefits should be awarded where:

14 (1) the ALJ has failed to provide legally sufficient reasons for rejecting [the
15 claimant’s] evidence, (2) there are no outstanding issues that must be resolved
16 before a determination of disability can be made, and (3) it is clear from the record
that the ALJ would be required to find the claimant disabled were such evidence
credited.

17 *Smolen*, 80 F.3d at 1292.

18 In this case, the Court has determined the ALJ committed harmful error and has directed
19 the ALJ to re-evaluate medical opinion evidence from Dr. Wheeler, Plaintiff’s subjective
20 symptom testimony, the lay witness testimony, the RFC, and the Step Five findings on remand.
21 Because outstanding issues remain regarding the medical evidence, Plaintiff’s testimony, the lay
22 witness testimony, the RFC, and Plaintiff’s ability to perform jobs existing in significant
23 numbers in the national economy, remand for further consideration of this matter is appropriate.
24

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4

Dated this 4th day of April, 2019.

David W. Christel
United States Magistrate Judge